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# Davis v. Monroe County Board of Education Goes to College: Holding Post-Secondary Institutions Liable under Title IX for Peer Sexual Harassment

Karen E. Edmonson

## COMMENT

# *DAVIS v. MONROE COUNTY BOARD OF EDUCATION* GOES TO COLLEGE: HOLDING POST-SECONDARY INSTITUTIONS LIABLE UNDER TITLE IX FOR PEER SEXUAL HARASSMENT

*Karen E. Edmonson**

### INTRODUCTION

Sexual harassment[1] in America's schools has been a popular topic in recent years, not only in national newspapers and magazines, but in federal courtrooms as well.[2] The problem itself, however, is far

* Candidate for Juris Doctor, Notre Dame Law School, 2000; B.A., University of California at Los Angeles, 1995. I would like to thank all those who made the writing of this Comment, and law school in general, bearable, namely my parents, Phyllis Engler and Jim Edmonson, my sister Suzy, the rest of my loving family, and my circle of friends, especially Steve Bowen. A special note of gratitude goes to Professor Tex Dutile who inspired this Comment and to all the staff who tirelessly proofed and critiqued my work.

1 Sexual harassment is defined as

> [u]nwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature . . . when (1) submission to such conduct is made either explicitly or implicitly a term or condition of an individual's employment, (2) submission to or rejection of such conduct by an individual is used as the basis for employment decisions affecting such individual, or (3) such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment.

29 C.F.R. § 1604.11 (1999).

2 *See, e.g.*, Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Doe v. Univ. of Ill., 138 F.3d 653 (7th Cir. 1998), *vacated*, 119 S. Ct. 2016 (1999); Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997), *aff'd on reh'g*,

from recent and has risen to clearly unacceptable levels in all schools—elementary, secondary, and post-secondary. A 1993 study by the American Association of University Women Educational Foundation found that four out of five students reported they had been the target of some form of sexual harassment between the eighth and eleventh grades.[3] Seventy-nine percent of these students claimed that fellow students had been the perpetrators, an occurrence termed student-to-student or peer harassment.[4] The situation rarely improved as students headed to universities and colleges; in 1988 a study reported in the *Journal of Vocational Behavior* found that over seventy-five percent of undergraduate women experience some form of harassing behavior during their university experience.[5] The National Association of Women in Education claims that ninety percent of all reported instances of sexual harassment on university campuses qualify as peer harassment.[6] Of course, one must wonder how many instances of harassment go unreported every year, creating doubt as to whether these percentages adequately represent the true scope of the dilemma.

While peer harassment presents a serious societal problem at large, as a legal problem American courts have been examining harassment in schools for over twenty years.[7] Through Title IX of the Education Act of 1972,[8] Congress made sexual discrimination illegal in publicly-financed schools. Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal funding assistance."[9] Because the statute does not delineate the standard required for plaintiffs to hold federally-funded educational institutions liable for peer harassment, the task of interpretation has fallen to the district and circuit courts around the country.

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169 F.3d 820 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

3 *See* AMERICAN ASSOCIATION OF UNIVERSITY WOMEN EDUCATIONAL FOUNDATION, HOSTILE HALLWAYS: THE AAUW SURVEY ON SEXUAL HARASSMENT IN AMERICA'S SCHOOLS 7 (1993) (summarizing research by Louis Harris and Associates).

4 *See id.* at 10–11.

5 *See* Louise F. Fitzgerald et al., *The Incidence and Dimensions of Sexual Harassment in Academia and the Workplace*, 32 J. VOCATIONAL BEHAV. 152, 162 (1988).

6 *See* Verna L. Williams, *A New Harassment Ruling: Implications for College*, 45 CHRON. HIGHER EDUC. A56, A56 (1999).

7 The first case involving sexual harassment in an educational institution under Title IX occurred in 1977 in *Alexander v. Yale University*, 459 F. Supp. 1 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980).

8 20 U.S.C. §§ 1681–88 (1994).

9 *Id.* § 1681(a).

With confusion and disparate treatment of cases among the circuits,[10] the time was ripe for the Supreme Court to decide when a school would incur liability for peer sexual harassment among its students. And on May 24, 1999, in *Davis v. Monroe County Board of Education*, it did.[11]

This Comment focuses specifically on the appropriateness of applying the standard set forth in *Davis* at the university and college level. It begins in Part I with a review of the progression of prior sexual harassment litigation. Part II continues with an explanation of the four theories for institutional liability supported by various circuit courts prior to *Davis*. Part III explores the Supreme Court's holding in *Davis*, while Part IV considers Justice Kennedy's dissent and the specific issues it raises regarding university liability. Part V provides suggestions as to what schools, especially those at the post-secondary level, should do in order to comply with *Davis*. Various lower court decisions applying *Davis* are discussed in Part VI. The Comment concludes with the argument that, because *Davis* proscribes such a demanding liability standard, it is suitable for all schools, including post-secondary institutions.

## I. CASE HISTORY OF TITLE IX SEXUAL HARASSMENT LITIGATION

In 1979, with its decision in *Cannon v. University of Chicago*,[12] the Supreme Court changed the course of Title IX litigation forever. In Cannon a female student brought a private cause of action under Title IX against two private medical schools, claiming that by denying her admission the schools discriminated against her based on her gender.[13] While both the district[14] and circuit[15] courts dismissed her complaint, holding that Tile IX did not allow for a private cause of action, the Supreme Court reversed after examining the legislative intent behind Title IX and Title VI.[16] Finding that Title IX mirrored Title VI,[17] the Court explained that when Congress enacted Title IX,

10 *See* Part II *infra* for a discussion of this issue.

11 119 S. Ct. 1661 (1999).

12 441 U.S. 677 (1979).

13 *See id.* at 680 & nn.1–2.

14 *See* Cannon v. Univ. of Chicago, 406 F. Supp. 1257 (N.D. Ill. 1976), *aff'd*, Cannon v. Univ. of Chicago, 559 F.2d 1063 (7th Cir. 1976), *rev'd*, 441 U.S. 677 (1979).

15 *See* Cannon v. Univ. of Chicago, 559 F.2d 1063 (7th Cir. 1976), *rev'd*, 441 U.S. 677 (1979).

16 *See id.* at 689–709 (citing 42 U.S.C. § 2000d (1994)).

17 Title VI provides that "[n]o person in the United States shall, on the ground of race, color, or national origin, be excluded from participating in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Fed-

"the critical language in Title VI had already been construed as creating a private remedy."[18] The Court concluded that "[n]ot only the words and history of Title IX, but also the subject matter and underlying purposes, counsel implication of a cause of action in favor of private victims of discrimination."[19] The Supreme Court had opened the door to private litigants in Title IX actions.

Seven years later, the Court further interpreted the boundaries of sexual harassment litigation. In *Meritor Savings Bank v. Vinson*,[20] a Title VII employment-discrimination case, the Court defined two types of actionable sexual harassment—quid pro quo and hostile environment.[21] Quid pro quo claims, involving the offer of a specific benefit in exchange for sexual favors, had been the traditional form of sexual harassment litigation. *Meritor*, however, also recognized hostile environment harassment.[22] These claims focus on the overall atmosphere of the work or educational environment, disallowing "conduct [that] has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment."[23]

Although all sexual harassment claims are, by their very nature, fact-specific, hostile environment cases depend to an even greater extent on the totality of the circumstances. In *Meritor*, the plaintiff, a teller at Meritor Savings Bank, had been involved in a sexual relationship with her supervisor for a period of four years.[24] She claimed, however, that the relationship developed in response to repeated demands by her supervisor and on many occasions lacked full consent.[25] The sexual episodes occurred on bank premises as well as at hotels and had created an atmosphere in which Vinson feared losing her job

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eral financial assistance." 42 U.S.C. § 2000d (1994). Title IX is identical, with the exception that Congress replaced the phrase "race, color, or national origin" of Title VI with the word "sex" in Title IX. *See* 20 U.S.C. § 1681(a) (1994).

18 *Cannon*, 441 U.S. at 696.

19 *Id.* at 709.

20 477 U.S. 57 (1986).

21 The terms "quid pro quo" and "hostile environment" in sexual harassment litigation are no longer controlling for employer-liability purposes. *See* Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257 (1998). However, the terms and their definitions remain essential when "there is a threshold question whether a plaintiff can prove discrimination in violation of Title VII" or Title IX. *Id.* at 2265.

22 *See Meritor*, 477 U.S. at 65–67.

23 *Id.* at 65 (citing EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. § 1604.11(a)(3) (1999)).

24 *See id.* at 60.

25 *See id.*

should she refuse.[26] The Supreme Court unanimously agreed that the plaintiff had stated a viable claim for hostile environment sexual harassment.[27] The Court also ruled, however, that "for [hostile environment] sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'"[28]

*Meritor* contributed another important component to the history of sexual harassment law by distinguishing voluntary from unwelcome behavior. While the lower courts had focused (erroneously) on the "voluntariness" of the plaintiff's participation in the sexual relationship,[29] the Supreme Court stated that "[t]he correct inquiry is whether respondent by her conduct indicated that the alleged sexual advances were unwelcome, not whether her actual participation in sexual intercourse was voluntary."[30] This distinction followed the language of the Equal Employment Opportunity Commission's 1980 *Guidelines on Discrimination Because of Sex*,[31] a document accorded great deference by the Court.[32]

The next major case in the development of Title IX litigation, *Franklin v. Gwinnett County Public Schools*,[33] involved a female high school student charging her school with failing to prevent a teacher from repeatedly sexually harassing and abusing her.[34] Franklin claimed that the school not only had knowledge of the harassment and did nothing to stop it, but also that its administrators and teachers discouraged her from pressing charges.[35] Again, as in *Cannon*, the Court looked to the legislative history of Title IX to determine if a plaintiff could obtain pecuniary damages from a school for violating the statute.[36] Under common law principles, when Congress creates a law, it allows for all appropriate remedies unless expressly excluded.[37] Examining the state of the law at the time of Title IX's enactment, the Court concluded that this traditional common law presumption prevailed.[38] Therefore, an award of monetary damages was appropriate

26 *See id.*
27 *See id.* at 67.
28 *Id.* (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).
29 *See id.* at 68.
30 *Id.*
31 29 C.F.R. § 1604 (1999).
32 *See Meritor*, 477 U.S. at 65.
33 503 U.S. 60 (1992).
34 *See id.* at 63.
35 *See id.* at 64.
36 *See id.* at 71–73.
37 *See id.* at 66.
38 *See id.* at 71–72.

on a showing of an intentional violation of Title IX. In explaining its position, the Court stated that

> unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." We believe the same rule should apply when a teacher sexually harasses and abuses a student.[39]

The Northern District of California, in *Doe v. Petaluma City School District*,[40] relied heavily upon *Franklin*'s holding when, for the first time, a federal court recognized a claim for peer sexual harassment. In *Petaluma*, a junior high student (Doe) endured repeated sexually derogatory name calling, received numerous threats and physical assaults from both male and female students, and refused to enter the restroom because of the pervasive graffiti.[41] Eventually, when the harassment continued even after the administration transferred Doe to a different public school, Doe's parents were forced to enroll her in a private school.[42] Doe also required ongoing medical and psychological treatments due to the harassment.[43]

The court in *Petaluma* classified the cause of action as one of hostile environment sexual harassment, analogizing it to the teacher-student situation in *Franklin*.[44] It then held that the standard set forth in *Franklin* was not a negligence standard ("knew or should have known"), despite its reliance on *Meritor* and other employment cases.[45] Instead, in order for a school to be held liable for student sexual harassment, the plaintiff must show that the school itself intentionally discriminated on the basis of sex.[46] This could be shown, the court explained, circumstantially where teachers or administrators had knowledge of peer sexual harassment yet failed to take sufficient remedial action.[47]

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39 *Id.* at 75 (quoting Meritor Sav. Bank v. Vinson, 477 U.S. 57, 64 (1986)).

40 830 F. Supp. 1560 (N.D. Cal. 1993), *reh'g granted*, 949 F. Supp. 1415 (N.D. Cal. 1996).

41 *See id.* at 1563–65.

42 *See id.* at 1566.

43 *See id.*

44 *See id.* at 1575.

45 *See id.*

46 *See id.* at 1574–76.

47 *See id.* at 1575. While *Petaluma* represents a major breakthrough in peer sexual harassment litigation, Doe herself could not meet the standard set forth by the court and ultimately failed in her claim. *See id.* at 1576.

## II. CIRCUIT COURT TESTS PRIOR TO *DAVIS*

Before the Supreme Court ruled definitively in *Davis* on the standard by which a school could be held liable for peer sexual harassment under Title IX, various circuits had developed three separate theories for liability: the "knew or should have known" negligence standard;[48] the "intentional discrimination" standard, which applies if a school's response differs based on the complaining student's sex;[49] and the "actual knowledge" or "deliberate indifference" standard.[50] Additionally, a fourth theory, supported by the Eleventh Circuit, stated that school districts could not be held liable for peer harassment under Title IX.[51] Each of these theories will now be discussed in turn.

### *A. "Knew or Should Have Known" Standard*

The Fourth Circuit, in *Brzonkala v. Virginia Polytechnic Institute and State University*,[52] became the first court to find liability at the college or university level for peer sexual harassment. The plaintiff, Christy Brzonkala, was a freshman at Virginia Tech when two student football players raped her in her dorm room.[53] Seven months later, Brzonkala filed a complaint under the university's Sexual Assault Policy.[54] One of the players, who admitted to raping the plaintiff, was suspended for two semesters under the Abusive Conduct Policy, yet the University later determined the suspension to be too harsh a penalty based on previous cases under the same policy and deferred the punishment

48 *See, e.g.*, Brzonkala v. Virginia Polytechnic Inst. & State Univ., 132 F.3d 949 (4th Cir. 1997), *aff'd on reh'g*, 169 F.3d 820 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S. Ct. 11 (1999).

49 *See, e.g.*, Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997); Rowinsky v. Bryan Indep. Sch. Dist., 80 F.3d 1006 (5th Cir. 1996).

50 *See, e.g.*, Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 2020 (1999); Oona v. McCaffrey, 143 F.3d 473 (9th Cir. 1998), *amended by* No. 95-16046, 1998 WL 216944 (9th Cir. Apr. 24, 1998), *cert. denied*, 119 S. Ct. 2039 (1999); Doe v. University of Ill., 138 F.3d 658 (7th Cir. 1998), *vacated*, 119 S. Ct. 2016 (1999).

51 *See, e.g.*, Davis v. Monroe County Bd. of Educ., 120 F.3d 1390 (11th Cir. 1997) (en banc), *rev'd*, 119 S. Ct. 1661 (1999).

52 *Brzonkala*, 132 F.3d at 949 On rehearing the court affirmed in respect to the Violence Against Women Act issues but declined to render a decision on the hostile environment Title IX issue until *Davis* had been decided by the United States Supreme Court. *See* Brzonkala v. Virginia Polytechnic Inst. & State Univ., 169 F.3d 820 (4th Cir.) (en banc), *cert. granted sub nom.* United States v. Morrison, 120 S.Ct. 11 (1999).

53 *See Brzonkala*, 132 F.3d at 953.

54 *See id.*

until after graduation.[55] Brzonkala sued in federal district court, alleging that Virginia Tech's lack of meaningful punishment violated Title IX.[56]

The district court dismissed the plaintiff's Title IX claim for failure to state a claim upon which relief could be granted.[57] The Court of Appeals for the Fourth Circuit, however, reversed, looking to Title VII principles for guidance.[58] It concluded that a plaintiff, to be successful in a Title IX hostile environment sexual harassment claim, must meet the following five-part test:

> (1) that she (or he) belongs to a protected group; (2) that she (or he) was subject to unwelcome sexual harassment; (3) that the harassment was based on sex; (4) that the harassment was sufficiently severe or pervasive so as to alter the conditions of his (or her) education and create an abusive educational environment; and (5) that some basis for institutional liability has been established.[59]

In evaluating the fifth prong, the court stated that "[w]e must determine whether Brzonkala has alleged facts sufficient to support an inference that Virginia Tech 'knew or should have known of the illegal conduct and failed to take prompt and adequate remedial action.'"[60] Thus, the Fourth Circuit became the first and only federal court of appeals to accept the Title VII constructive negligence standard for peer sexual harassment cases.

### *B. "Intentional Discrimination" Standard*

The Fifth Circuit dealt with peer sexual harassment in *Rowinsky v. Bryan Independent School District*.[61] Holding that "a plaintiff must demonstrate that the school district responded to sexual harassment

55 *See id.* at 955–56. Brzonkala discovered the school's decision to delay the suspension by reading about it in the school's newspaper. *See id.* Fearing for her safety, she soon after dropped out of Virginia Tech. *See id.*

56 *See id.* at 956.

57 *See id.*

58 *See id.* at 957.

59 *Id.* at 958. The 11th Circuit's three-judge panel in *Davis v. Monroe County Board of Education*, 74 F.3d 1186, 1194 (11th Cir. 1996), *aff'd en banc*, 120 F.3d 1390 (11th Cir. 1997), *rev'd*, 119 S. Ct. 1661 (1999), originally formulated this test, borrowing standards from Title VII cases such as *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), and *Harris v. Forklift Systems, Inc.*, 510 U.S. 17 (1993). However, the 11th Circuit en banc rejected this theory of liability and reversed, holding that liability cannot attach to a school district for peer harassment. *See* Davis v. Monroe County Bd. of Educ., 120 F.3d 1390, 1406 (11th Cir. 1997) (en banc), *rev'd*, 119 S. Ct. 1661 (1999).

60 *Id.* at 960 (quoting Andrade v. Mayfair Management, Inc., 88 F.3d 258, 261 (4th Cir. 1996)).

61 80 F.3d 1006 (5th Cir. 1996).

claims differently based on sex,"[62] the court established the narrowest of the circuit interpretations of Title IX peer harassment liability.

The plaintiffs in *Rowinsky*, two sisters in the eighth grade, had been harassed repeatedly on both the school bus and the school grounds.[63] The harassment consisted of verbal abuse as well as physical touching of the girls' bottoms.[64] Not only did the students complain to the school bus driver at least eight times, but the girls' mother informed the principal and superintendent of the harassment on numerous occasions as well.[65] When the harassing behavior did not stop, even after the school suspended one of the boys for three days, the mother sued the school district and various employees under Title IX.[66]

The district court dismissed the case, holding that the plaintiff had failed to state a claim because she never alleged that the school treated sexual harassment differently on the basis of sex.[67] The Court of Appeals for the Fifth Circuit affirmed, framing the issue as "whether a school district may be liable under Title IX when one student sexually harasses another."[68] In its analysis, the court focused on the fact that Congress had enacted Title IX under the Spending Clause[69] and found that Title IX's legislative history, scope, structure, and agency interpretations all directed the court to preclude school liability for the acts of third parties.[70] Specifically, the court held that "[i]mposing liability for the acts of third parties would be incompatible with the purposes of a spending condition, because grant recipients have little control over the multitude of third parties who could conceivably violate the prohibitions of Title IX."[71] In order to state a claim in the Fifth Circuit, therefore, a plaintiff must allege that the school itself discriminated on the basis of sex by responding to boys' and girls' complaints differently.

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62 *Id.* at 1016.
63 *See id.* at 1008–09.
64 *See id.* at 1008.
65 *See id.* at 1008–09.
66 *See id.* at 1008–10.
67 *See id.* at 1010.
68 *Id.*
69 *See* U.S. CONST. art. I, § 8, cl. 1.
70 *See Rowinsky*, 80 F.3d at 1012.
71 *Id.* at 1013.

### C. *"Actual Knowledge" Standard*

In *Doe v. University of Illinois*,[72] a female high school student suffered repeated verbal and physical sexual harassment by a group of male students. One harasser went so far as to display his genitals to Doe.[73] Although Doe and her parents repeatedly reported the harassment to school officials, they took little action to end the behavior.[74] Moreover, certain administrators imputed fault to Doe and suggested she change her own behavior to avoid future harassment.[75]

The district court dismissed Doe's claim, agreeing with the standard set forth by the Fifth Circuit in *Rowinski* that a plaintiff must show disparate treatment by the school on the basis of sex in order to hold the school liable.[76] The Court of Appeals for the Seventh Circuit, however, expressly rejected this theory. In explaining the flaws it found in the Fifth Circuit's reasoning, the Seventh Circuit wrote that the plaintiffs did not seek to hold the school liable for actions of third parties; rather, the liability should attach on the basis of the school's own action or inaction in the face of known harassment.[77] In other words, the plaintiff could not sue a school directly for actions by a third party but could hold an institution liable on the basis of its response to the actions with the *response* constituting the harassment to be litigated.

The court continued by rejecting the Eleventh Circuit's Spending Clause analysis in its en banc *Davis v. Monroe County Board of Education* decision.[78] The Seventh Circuit agreed that because Congress enacted Title IX pursuant to the Spending Clause, an implicit contract arises between the recipients of federal funding and the government.[79] The court decided, however, that the Eleventh Circuit had interpreted Title IX too narrowly.[80] Since the United States Supreme Court had already recognized the legitimacy of teacher-on-student

72 138 F.3d 653 (7th Cir. 1998), *vacated*, 119 S. Ct. 2016 (1999).

73 *See id.* at 655.

74 *See id.* Although the school suspended two of the boys for ten days and transferred another boy out of Doe's biology class, the harassment continued. *See id.* When the school did nothing further to end or prevent the harassment, Doe's parents transferred her to a private school. *See id.*

75 *See id.*

76 *See id.* at 661–62.

77 *See id.* at 662.

78 120 F.3d 1390 (11th Cir. 1997) (en banc), *rev'd*, 119 S. Ct. 1661 (1999). See Part II.D *infra* for further discussion of this decision.

79 *See Doe*, 138 F.3d at 664–65; *see also Davis*, 120 F.3d at 1399.

80 *See Doe*, 138 F.3d at 664–65.

sexual harassment under Title IX,[81] regardless of the fact that the statute made no mention of this specific cause of action, not allowing claims of peer harassment would be inconsistent with the goals of Title IX.[82]

In determining the applicable theory of liability, the *Doe* court rejected the traditional Title VII constructive notice standard.[83] Instead, it determined that, before the school could be found liable, Title IX required actual knowledge by a school official.[84] The court argued that compelling the harassed student to report the offensive conduct does not place too heavy a burden on the student and gives the school a chance to resolve the issue before the courts become involved.[85] In explaining this standard, the court expressly rejected the "knew or should have known" standard as set out in the Office of Civil Rights' *Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* (OCR Guidance).[86] To this end, the court opined that "OCR's interpretation of Title IX is not entitled to strict deference from this Court."[87] The "actual knowledge" standard set forth in *Doe v. University of Illinois*, the theory most widely followed by the circuit courts,[88] ultimately prevailed in the Supreme Court.

### *D. No Institutional Liability Under Title IX*

The remaining standard, adopted by the Eleventh Circuit, rejected the availability of relief under Title IX against a school district or institution for peer sexual harassment. Aurelia Davis, the mother of fifth grader LaShonda Davis, sued the local school board for monetary and injunctive relief under Title IX in *Davis*.[89] LaShonda claimed that a boy in her class, named G.F. by the court, had sexually and

81 *See, e.g.*, Franklin v. Gwinnett County Pub. Sch., 503 U.S. 60 (1992).

82 *See Doe*, 138 F.3d at 665. Title IX specifically safeguards students by forbidding discrimination and the denial of educational benefits. *See* 20 U.S.C. § 1681(a) (1994).

83 *See id.* at 668.

84 *See id.*

85 *See id.*

86 62 Fed. Reg. 12,034 (1997).

87 *Doe*, 138 F.3d at 667.

88 *See, e.g.*, Bruneau v. South Kortright Cent. Sch. Dist., 163 F.3d 749 (2d Cir. 1998), *cert. denied*, 119 S. Ct. 2020 (1999); Oona v. McCaffrey, 143 F.3d 473 (9th Cir. 1998), *amended by* No. 95-16046, 1998 WL 216944 (9th Cir. Apr. 24, 1998), *cert. denied*, 119 S. Ct. 2039 (1999).

89 *See* Davis v. Monroe County Bd. of Educ., 862 F. Supp. 363 (1994), *rev'd*, 74 F.3d 1186 (11th Cir. 1996), *aff'd en banc*, 120 F.3d 1390 (11th Cir. 1997), *rev'd*, 119 S. Ct. 1661 (1999).

physically harassed her for more than six months.[90] After each occurrence, LaShonda reported the misbehavior to her teacher, as did her mother.[91] The teacher assured Mrs. Davis that she had notified the principal about the complaints, yet G.F. received no punishment.[92] When the harassment continued, Mrs. Davis contacted the school board's superintendent, who also did nothing to end the abuse.[93] Not only did G.F. remain a student in good standing, but for over three months the teacher would not allow LaShonda to switch her assigned seat away from the boy.[94] The harassment finally terminated when G.F. pled guilty to sexual battery.[95] By that time, however, LaShonda had suffered detrimental effects to her mental and physical health, and she experienced suicidal thoughts and a significant drop in her grades.[96]

The district court in *Davis* held that because "any harm to LaShonda was not proximately caused by a federally-funded educational provider," the school could not be held liable under Title IX.[97] Rejecting *Doe v. Petaluma City School District*'s[98] intentional discrimination theory, the court found no basis for a peer sexual harassment claim under Title IX.[99]

On appeal, a three-judge panel reinstated Davis's claim and remanded the case to the district court.[100] Acknowledging that the petitioner sought to hold school officials liable for their own actions in not controlling the harassment, and not for the actions of third parties, the panel decided that Davis had sufficiently stated a Title IX claim.[101] In explaining its reversal of the district court, the panel stated,

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90 *See id.* at 364.

91 *See id.* at 364–65.

92 *See id.* at 364.

93 *See id.* at 365.

94 *See id.*

95 *See id.*

96 *See id.*; *see also* Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1666, 1667 (1999) (stating that LaShonda's "previously high grades allegedly dropped as she became unable to concentrate on her studies . . . [and that] her father discovered that she had written a suicide note").

97 *Davis*, 862 F. Supp. at 367.

98 830 F. Supp. 1560 (N.D. Cal. 1993), *reh'g granted*, 949 F. Supp 1415 (N.D. Cal. 1996).

99 *See Davis*, 862 F. Supp. at 367.

100 Davis v. Monroe County Bd. of Educ., 74 F.3d 1186, 1195 (11th Cir. 1996), *aff'd en banc*, 120 F.3d 1390 (11th Cir. 1997), *rev'd*, 119 S. Ct. 1661 (1999).

101 *See id.* at 1193, 1995.

> [A]s Title VII encompasses a claim for damages due to a sexually hostile working environment created by co-workers and tolerated by the employer, Title IX encompasses a claim for damages due to a sexually hostile educational environment created by a fellow student or students when the supervising authorities knowingly fail to act to eliminate the harassment.[102]

In its en banc rehearing of *Davis*,[103] however, the Eleventh Circuit rejected its earlier Title VII analysis and instead focused on the legislative intent behind the enactment of Title IX under the Spending Clause.[104] Determining that, because the receipt of federal funds connotes a contractual relationship between the government and the school, Congress is required "to give potential recipients unambiguous notice of the conditions they are assuming when they accept federal funding."[105] Finding that these schools did not have notice of potential liability for peer sexual harassment,[106] the court determined that there could not be a cause of action brought against a school by a student for peer sexual harassment under Title IX.[107] The Supreme Court granted certiorari[108] to determine the appropriate standard for peer sexual harassment liability, finally silencing the mounting confusion and disagreement among the lower courts.

## III. *DAVIS* AT THE UNITED STATES SUPREME COURT

In the months following the May 1999 ruling, scholars from numerous disciplines published their opinions of the Court's approach to the issue of peer sexual harassment liability under Title IX.[109] The scope of this Comment is not, therefore, to rehash what has already been written, but to focus on the dissent's questions regarding the applicability of the ruling to institutions of higher learning. Nevertheless, this discussion would be incomplete without an analysis of the majority's opinion and the standard it announced.

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102 *Id.* at 1193.

103 120 F.3d 1390 (11th Cir. 1997) (en banc), *rev'd* 119 S. Ct. 1661 (1999).

104 *See id.* at 1399.

105 *Id.* (citing Pennhurst State Sch. & Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

106 The court did hold, however, that there had been notice to educational institutions of teacher-to-student sexual harassment liability. Therefore, a cause of action could be brought against a school receiving federal funding under Title IX for sexual harassment of a student by a teacher. *See id.* at 1401.

107 *See id.* at 1406.

108 *See* Davis v. Monroe County Bd. of Educ., 119 S. Ct. 29 (1998).

109 *See, e.g.*, Lisa A. Brown, *New Harassment Ruling Can Work*, 21 NAT'L. L.J. A23 (1999); Jeffrey Rosen, *The Age of Mixed Results*, 220 NEW REPUBLIC 43 (1999); Mary Leonard, *Schools Can Be Liable if Pupils Harass: Supreme Court Rules on Suits*, BOSTON GLOBE, May 25, 1999, at A1.

After deliberating for almost four-and-a-half months, the Supreme Court reversed the Eleventh Circuit's decision and held that in limited circumstances a private damages action for peer sexual harassment may lie against a publicly-funded school under Title IX.[110] The standard delineating these limited circumstances can be broken down into four requirements: (1) the funding recipient must act with deliberate indifference, (2) to known sexual harassment, (3) that is so "severe, pervasive, and objectively offensive" (4) that it "effectively bars the victim's access to an educational opportunity or benefit."[111]

In adopting this standard, the Court relied heavily on its 1998 ruling in *Gebser v. Lago Vista Independent School District*.[112] Also a Title IX sexual harassment case, *Gebser* involved a teacher-student relationship qualifying as quid pro quo harassment in the eyes of the Court. In *Gebser*, the Court abandoned Title VII's established agency and negligence theories for workplace harassment in favor of "actual knowledge" and "deliberate indifference" criteria for the school setting.[113] To distinguish Title VII from Title IX, the Court looked to their congressional purposes; the former attempted to make the victim whole in order to remedy past discrimination, while the latter involved protecting individuals from discrimination by federal fund recipients.[114] To that end, the Court concluded that "it would 'frustrate the purposes' of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of respondeat superior or constructive notice, i.e., without actual notice by a school district official."[115]

While *Davis* explicitly reaffirmed the admittedly "high standard imposed in *Gebser*,"[116] it clearly opined that "[p]eer harassment, in particular, is less likely to satisfy these requirements than is teacher-student harassment."[117] Interestingly, this standard presents a double-edged sword for both sides of the debate. For victims of sexual harassment and women's advocacy groups, the ruling presents a victory in the sense that educational institutions can be held liable under Title IX for peer sexual harassment. Marcia Greenberger, co-president of the National Women's Law Center, hailed the ruling as "a very impor-

110 *See Davis*, 119 S. Ct. at 1666.
111 *Id.*
112 524 U.S. 274 (1998).
113 *See id.* at 283–84, 292–93.
114 *See id.* at 286–87.
115 *Id.* at 285 (quoting Guardian Ass'n. v. Civil Serv. Comm'n, 463 U.S. 582, 595 (1983) (White, J.)).
116 *Davis*, 119 S. Ct. at 1671.
117 *Id.* at 1676.

tant win for women and girls in schools."[118] Since the ruling sets such a demanding standard for liability, however, it is questionable how many plaintiffs will be able to meet it. This rigorous standard allows school boards around the country to breathe a little easier. Julie Underwood, general counsel for the National School Board Association, believes that the standard "is one we can live with."[119] Obviously, although school boards and officials would have preferred the Court to affirm the Eleventh Circuit's "no liability" standard, they echo the National School Board Association's sentiment that the Court set an acceptable standard.

Another notable topic of debate involves the comparison of the new Title IX standard to traditional Title VII standards regarding sexual harassment in the workplace. By requiring deliberate indifference, the law burdens student plaintiffs with a much higher standard than their adult worker counterparts in sexual harassment cases.[120] For attorney Jeffrey Thaler, the Supreme Court's holding mandates that "students are separate, less equal, and more vulnerable legally (and therefore factually) to sexual harassment under Title IX than are adult workers under Title VII."[121] Because the Court explicitly rejected the agency and negligence standards of Title VII, Thaler and others see the Court protecting adults in circumstances under which students are not protected.

Alternatively, the issue can be analyzed by examining the litigation risks for schools versus employers. Jennifer Braceras, a national advisory board member of the Independent Women's Forum, points out that

> [u]nlike Title VII, which prohibits sex discrimination in employment, Title IX does not provide for agency investigation and conciliation of complaints prior to the filing of a case in federal court, steps that allow cases to be resolved quickly and at low cost. And Title IX, also unlike Title VII, provides for no statutory cap on damages. That means one large jury verdict could bankrupt a small school district.[122]

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118 *See* Leonard, *supra* note 109.

119 *Id.*

120 Title VII sexual harassment cases are contingent on the theory of respondeat superior, negating the need for the plaintiff to prove discrimination or even actual knowledge by the employer. *See, e.g.*, Burlington Indus., Inc. v. Ellerth, 118 S. Ct. 2257, 2265 (1998) ("In express terms, Congress has directed federal courts to interpret Title VII based on agency principles.").

121 Jeffrey A. Thaler, *Are Schools Protecting Children from Harassment?*, 35 TRIAL 32, 32 (1999).

122 Jennifer C. Braceras, *New Menace in the Schools: Hand Holding*, WALL ST. J., May 25, 1999, at A26.

While the argument that students may not be as protected by the courts as employees still stands, the same holds true for schools as compared to employers. This may relate to the courts' historical inclination to avoid as often as possible matters involving internal school policies.[123] Regardless of the reasoning behind Title VII and Title IX application, however, courts appear to protect both employees and employers to a greater extent than either students or educational institutions.

While supporters of both sides of the argument in *Davis* did not get everything they hoped for from the Court, generally most appear to be pleased with the ruling. At least four people, however, were not—the dissenting justices.

## IV. THE *DAVIS* DISSENT

In a sixteen-page dissent,[124] Justice Kennedy, joined by Chief Justice Rehnquist, Justice Scalia, and Justice Thomas, accused the majority of overlooking or misconstruing a number of fundamental points in their ruling.[125] While many of these concerned general principles, a few directly addressed the question of the ruling's applicability to post-secondary institutions. It is to these concerns that this Comment now turns.

### *A. Control over Student Actions*

The first issue raised by Justice Kennedy regarding the ruling's effect at the post-secondary level involves the ability of a college or university to control a student's actions.[126] Public schools have historically been considered substitute guardians by the courts, responsible not only for educating children, but also for ensuring the safety and

123 *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 104 (1968) (stating that "public education in our Nation is committed to the control of state and local authorities" and that federal courts should be hesitant to "intervene in the resolution of conflicts which arise in the daily operation of school systems").

124 *See* Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1677–92 (1999) (Kennedy, J., dissenting).

125 *See, e.g., id.* at 1678 ("[T]he majority finds statutory clarity where there is none and discovers indicia of congressional notice to the States in the most unusual of places."); *id.* at 1680 ("To state the majority's test is to understand that it is little more than an exercise in arbitrary line-drawing."); *id.* at 1682 ("Perhaps even more startling than its broad assumptions about school control over primary and secondary school students is the majority's failure to grapple in any meaningful way with the distinction between elementary and secondary schools, on the one hand, and universities on the other.").

126 *See id.* at 1682–83.

well-being of their students during school hours. This idea of elementary and secondary schools being *in loco parentis* is still enforced by courts; both the majority and dissenting opinions refer to the 1995 case *Vernonia School District 47J v. Acton*,[127] in which the Court stated that "the nature of [the state's] power [over public school children] is custodial and tutelary, permitting a degree of supervision and control that could not be exercised over free adults."[128] As the *Davis* dissent correctly points out, however, universities do not exercise custodial and tutelary control over their students.[129] University students, as emancipated adults, do not require the type of monitoring or care necessary at the lower level schools. In fact, not only do university students not require this custodial attention from school officials, they often fight any type of invasive control by the institution. Social and academic freedom are considered crucial to the learning process at the post-secondary level, factors in opposition to overreaching institutional control or monitoring. Additionally, not only do the students and faculty resist institutional control over their actions, the university often lacks the resources, ability, and even desire to control its student population in all situations.

A close reading shows, however, that the majority opinion does not state that all schools must have complete control over every student's actions throughout the day. Common sense tells us that this is impossible—even schools with the fewest code violations by their students experience occasional lapses of control. True to this reality, the Court never states that schools must abolish sexual harassment from campuses or always prevent it.[130] To the contrary, the standard endorsed by the majority demands that institutions take appropriate or reasonable remedial actions in the face of known harassment.[131] The Court adamantly explains that compliance with this standard does not require that institutions "purg[e] their schools of actionable peer harassment or that administrators must engage in particular disciplinary action" in order to avoid liability.[132]

Addressing specifically the issue of peer harassment in higher education, the majority writes,

> [T]he standard set out here is sufficiently flexible to account both for the level of disciplinary authority available to the school and for the potential liability arising from certain forms of disciplinary ac-

127 515 U.S. 646 (1995).
128 *Davis*, 119 S. Ct. at 1682–83 (quoting *Vernonia*, 515 U.S. at 655).
129 *See id.* at 1683.
130 *See id.* at 1673–74.
131 *See id.* at 1674.
132 *Id.* at 1673–74.

> tion. A university might not, for example, be expected to exercise the same degree of control over its students that a grade school would enjoy, . . . and it would be entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.[133]

This statement implies that the ability of a school, whether elementary, secondary, or post-secondary, to control its students factors into the determination of whether the school's response was reasonable. The court must determine reasonableness in light of the totality of the circumstances, an approach that will allow colleges and universities some leeway in their decisions concerning discipline or alternate remedies when dealing with sexual harassment on their campuses.

An interesting issue regarding control over university students arises when one distinguishes between public and private institutions. Historically, private colleges have been expected to, and in most cases do, exert more control over students and their actions both on and off campus than have their public counterparts. The *Davis* decision, therefore, may subject private institutions that receive government funding under Title IX to a greater risk of liability because they maintain a greater level of control over student behavior. Since the majority finds that a university's ability to control its students factors into the determination of whether the university's response was reasonable,[134] must private universities act faster and take more precautions than their public counterparts are expected to? Possibly. Yet the fact that the degree of control remains merely one of many factors when determining the reasonableness of a school's response appears to diminish the impact of this particular factor on liability.

### *B. First Amendment Rights*

The second issue raised by the dissent in regard to post-secondary application of the majority's standard relates to the students' First Amendment right of free speech.[135] The dissenting justices opine that, when schools discipline for speech violating sexual harassment policies, they may be punishing students for constitutionally protected speech.[136] The dissent cites a multitude of federal cases in which the courts struck down university speech codes and anti-harassment poli-

133 *Id.* at 1674.

134 *See id.*

135 *See id.* at 1683.

136 *See id.*

cies.[137] Concluding this argument, Justice Kennedy writes, "The difficulties associated with speech codes simply underscore the limited nature of a university's control over student behavior that may be viewed as sexual harassment."[138]

While the issue of First Amendment rights has been a major topic in federal courts,[139] the dissent appears to overlook important issues that distinguish traditional First Amendment cases from freedom of speech in harassment cases. First, unless the person or entity enforcing a speech code or regulation is a state actor, no constitutional issue exists. The law recognizes public colleges and universities as state actors and attributes any official action by the institution as state-endorsed. Therefore, the Constitution, with all of its protections, applies to public campuses with the same force and vigor as it does in any public area. Private colleges, conversely, form a contractual relationship with their students.[140] As mere parties to a contract, not state actors, private institutions can validly enforce speech codes that would otherwise infringe on a student's First Amendment rights.

While this would lead one to believe that only public universities are subject to the mandates of the Constitution, certain states have enacted state codes that prohibit private schools from encroaching on a student's First Amendment rights, regardless of the absence of state action. California, for example, enacted the *Leonard Law*,[141] which states,

> No private postsecondary educational institution shall make or enforce any rule subjecting any student to disciplinary sanctions solely on the basis of conduct that is speech or other communication that, when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment to the United States Constitution . . . .[142]

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137 *See, e.g.*, Dambrot v. Central Mich. Univ., 55 F.3d 1177 (6th Cir. 1995); IOTA XI Chapter of Sigma Chi Fraternity v. George Mason Univ., 993 F.2d 386 (4th Cir. 1993); UWM Post, Inc. v. Board of Regents, 774 F. Supp. 1163 (E.D. Wis. 1991); Doe v. University of Mich., 721 F. Supp. 852 (E.D. Mich. 1989).

138 *Davis*, 119 S. Ct. at 1683.

139 *See, e.g.*, Board of Regents v. Southworth, 119 S. Ct. 1332 (1999); Rosenberger v. Rector & Visitors, 515 U.S. 819 (1995); Cohen v. San Bernadino Valley College, 883 F. Supp. 1407 (C.D. Cal. 1995).

140 *See* Runyon v. McCrary, 427 U.S. 160, 167 (1976) ("The relationship the parents had sought to enter into with the [private] schools was in the court's view undeniably contractual in nature."); Dixon v. Alabama State Bd. of Educ., 294 F.2d 150, 157 (5th Cir. 1961) (holding that it is a "well-settled rule that the relations between a student and a private university are a matter of contract").

141 CAL. EDUC. CODE § 94367 (Deering 1996).

142 *Id.* § 94367(a).

Therefore, before dismissing a First Amendment claim against a private school, it is imperative to determine if the institution is located in a state with such a code, since the First Amendment appears to enjoy the same force at all post-secondary campuses in such states.

Next, the First Amendment does not protect all forms of speech. Specific categories such as fighting words, perjury, defamatory language, and obscenity are not constitutionally protected and are therefore punishable by a court of law. Furthermore, the Constitution protects conduct even less than it protects speech. In *Texas v. Johnson*,[143] the Court set forth a two-part test enabling certain conduct to fall into the category of protected communication under the First Amendment. First, the actor must intend to "convey a particularized message," and second, there must be a great likelihood that those who view the conduct would understand the message being conveyed.[144] If these two criteria are met, the conduct is deemed expressive communication under the First Amendment Free Speech Clause and is likely protected. If not, then the actor has no constitutional right to engage in the conduct and may be legally prohibited from such actions by a school or other institution.

Additionally, in *R.A.V. v. St. Paul*,[145] the Supreme Court held,

> [S]ince words can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets), a particular content-based subcategory of a proscribable class of speech can be swept up incidentally within the reach of a statute directed at conduct rather than speech.[146]

An examination of most harassment codes reveals that the bulk focus on student conduct, not speech. Moreover, in order for harassment to rise to the level indicated by the Court as actionable, some type of offensive conduct is, for all practical purposes, mandatory, as pure speech will rarely rise to the high standard set by *Davis*.

Even if the Constitution presumptively protects the affected speech or conduct, a school may have a state interest so compelling that regulation of the communication is legal. Because sexual harassment codes constitute content-based regulations rather than content-neutral ones,[147] the university must apply this compelling-state-inter-

143 491 U.S. 397 (1989).

144 *Id.* at 404 (quoting Spence v. Washington, 418 U.S. 405, 410–11 (1974)).

145 505 U.S. 377 (1992).

146 *Id.* at 389.

147 Content-based regulations, such as codes prohibiting racial or ethnic slurs, seek to prohibit communication based on the message being conveyed. Content-neutral regulations, conversely, restrict speech based on the time, place, and manner of

est test in order justify the regulations. This test requires the institution to prove that the "regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end."[148] As the dissent dramatically points out with its laundry list of unsuccessful speech codes cases, however, the courts have been largely unwilling to find this test satisfied by universities attempting content-based regulations.[149] With this case history, it is difficult to understand the *Davis* Court's support for harassment policies and discipline procedures, policies that must be content-based.[150]

Because this Comment examines the *Davis* ruling at the post-secondary level in particular, it must necessarily examine the issue of free speech from a more general perspective, looking at case law that deals with communication both on and off university campuses. A brief mention should be made, however, of the Supreme Court's rulings dealing with speech at elementary and secondary schools. In these cases, the Court gives school officials a significantly broader power to regulate speech in educational settings while still honoring the First Amendment. Three decisions stand out as forming the dominant doctrinal approaches: *Tinker v. Des Moines Independent School District*,[151]

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the communication. For example, codes that prohibit speech or conduct that disrupts the teaching environment are content-neutral and have generally been upheld by courts as constitutional so long as they are reasonable under the circumstances. Content-neutral codes can also regulate speech and conduct on a public university campus outside of the classroom as long as they are narrowly-tailored to serve a significant government interest and alternate means of communication are available to the students. For an excellent review of speech issues surrounding university speech codes, see James R. Bussian, *Anatomy of the Campus Speech Code: An Examination of Prevailing Regulations*, 36 S. TEX. L. REV. 153 (1995).

148 Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983).

149 *See supra* note 137.

150 Is it possible that the Court is carving out yet another exception to protected speech, given the need to remedy the detrimental secondary effects of sexual harassment?

151 393 U.S. 503 (1969). *Tinker*, a pivotal case in First Amendment rights for school children, established the "substantial disruption test" still in use today. The Tinker children, two boys and a girl ranging in age from 13 to 16, participated in a silent protest against the Vietnam war by wearing black armbands during the holiday season. *See id.* at 504. When the principals of the Des Moines schools became aware of this plan, they enacted a policy that any student wearing and refusing to remove a black armband at school would be suspended until he or she agreed not to wear the band on school grounds. *See id.* All three of the Tinker children were suspended for wearing the armbands to school and did not return to classes until after New Year's Day, the last day of the silent protest. *See id.* Their parents brought a complaint in district court seeking an injunction prohibiting the school from punishing them. *See id.* The court agreed with the petitioners that the wearing of black armbands expressed a political viewpoint and therefore constituted protected speech, but it held

*Bethel School District v. Fraser*,[152] and *Hazelwood School District v. Kuhlmeier*.[153] If the particular speech significantly affects the safety or security of other students, or if it causes a substantial or material disruption to the educational process, *Tinker* allows the speech to be prohibited.[154] In *Fraser*, the Court determined that school officials could

in favor of the school since the armbands could have reasonably created a disturbance to the operation and discipline of the school. *See id.* at 508. The Eighth Circuit affirmed without opinion, but the Supreme Court reversed, finding the silent, passive action to be protected speech. *See id.* at 506. Attempting to balance a student's free speech right versus the school's need to maintain a disciplined, orderly environment, the Court determined that only student actions that materially disrupt class, create a substantial disorder to the educational environment, or invade the rights of other students are unprotected by the Constitution. *See id.* at 513.

152 478 U.S. 675 (1986). This case involved a high school student, Matthew Fraser, delivering a student government nominating speech at a mandatory school assembly. *See id.* at 677. Approximately 600 students heard the speech, which contained an "elaborate, graphic, and explicit sexual metaphor" describing the candidate. *Id.* Fraser's teachers had warned him prior to the assembly that the speech was inappropriate and should not be given, but he decided to give it unmodified regardless of their advice. *See id.* The following day, school officials informed Fraser that his speech violated the school rule forbiding obscene language, which stated, "Conduct that materially and substantially interfere[s] with the educational process is prohibited, including the use of obscene, profane language or gestures." *Id.* After the school gave Fraser a chance to explain his conduct, he was suspended for three days and disqualified from the list of candidates for graduation speaker. *See id.* Fraser's father brought suit in district court alleging that the rule violated his son's First Amendment rights. *See id.* The court agreed that the regulation was unconstitutionally vague and overbroad, and the Ninth Circuit affirmed. *See id.* at 677–80. The Supreme Court reversed, upholding the school's right to regulate obscene and lewd speech in the educational setting. *See id.*

153 484 U.S. 260 (1988). In *Hazelwood*, three students brought suit against their school district in response to school officials having deleted two pages from their school newspaper, the *Spectrum*. *See id.* at 262. The Journalism II class wrote and edited the paper, which was distributed approximately every three weeks to students, school personnel, and members of the community. *See id.* For the May 13, 1983 edition, the students had written articles regarding high school pregnancies at Hazelwood and the impact of divorce among the student population. *Id.* at 263. The principal reviewed these articles, and after conferring with the supervising teacher and other superior officials, he required that the pages containing these articles be deleted from the *Spectrum* before publication. *See id.* The district court concluded that "school officials may impose restraints on students' speech activities that are 'an integral part of the school's educational function.'. . . so long as their decision has 'a substantial and reasonable basis.'" *Id.* at 264 (quoting Frasca v. Andrews, 463 F. Supp. 1043, 1052 (E.D.N.Y. 1979). The Eighth Circuit reversed, holding that the paper was a public forum and therefore the school's censoring of its content offended the First Amendment. *See id.* at 265. The Supreme Court reversed, declaring that the paper, as a class project, was not a public forum. *See id.* at 273–74.

154 *See Tinker*, 393 U.S. at 513.

prohibit vulgar or plainly offensive speech, even if it does not disrupt or substantially interfere with the educational atmosphere.[155] And finally, the Court decided in *Hazelwood* that, if the speech is school-sponsored, the school has a right to regulate it, providing the regulation is reasonably related to valid educational or pedagogical concerns.[156]

These cases show that the Supreme Court permits public school officials to regulate student speech in many situations, and at first glance this trend would seem to favor post-secondary regulations as well. If one looks to the reasoning behind these rulings, however, it becomes apparent that the Court did not intend for these exceptions to the First Amendment to apply to all schools, especially not at the post-secondary level. A variety of factors arise in public elementary and secondary schools that do not apply in a university setting. Minor school children constitute a captive audience, restrained in their seats by compulsory attendance laws. As discussed above, kindergarten to twelfth grade schools act *in loco parentis*, creating a legal duty of care toward the child. Additionally, these children have a state-given legal right to a free education at least through elementary school—and sometimes through high school as well. Finally, "elementary and secondary school students, unlike their counterparts at the college and university level, are more impressionable and vulnerable, and thus they are less capable of handling uninhibited, robust discussion on all subjects."[157] With all of these issues to take into account, the Supreme Court has a legitimate interest in protecting public elementary and secondary level school children from harassing, vulgar, or disruptive speech. For the most part, however, these issues are not present on the university campus, where academic freedom and the exchange of controversial ideas supply a welcome and necessary addition to the learning process. Therefore, to rely on the above trilogy of cases to allow content-based speech restrictions at the post-secondary level would be erroneous.

So where does this leave colleges and universities that want to (and, under the Court's interpretation of Title IX, are required to) restrict and punish sexually harassing speech on their campuses? The good news is that most harassing behavior, as noted above, combines speech and conduct. Since conduct may be more easily regulated

155 *See Fraser*, 478 U.S. at 685–86.

156 *See Hazelwood*, 484 U.S. at 273.

157 Kay P. Kindred, *When Equal Opportunity Meets Freedom of Expression: Student-On-Student Sexual Harassment and the First Amendment in School*, 75 N.D. L. REV. 205, 233 (1999).

than speech, schools can focus on these actions without offending the First Amendment. Additionally, sexual harassment may violate other laws, such as sexual assault, sexual battery, and rape, which can be used to prosecute the harasser. And let us not forget *Davis*'s exacting standard requiring harassment to be drastically "severe, pervasive, and objectively offensive."[158] It is hard to imagine a situation in which protected speech would rise to this level without accompanying unprotected speech or conduct.

### *C. Standard for "Who Must Know" About Harassment to Impute Knowledge*

A third issue that the dissent raises concerns *who* must have knowledge of the harassment in order to impute actual knowledge to the school itself.[159] The dissent declares that the majority never truly defines the standard, leaving lower courts to distinguish the type of school employee who must have knowledge of the harassment before it is actionable under Title IX.[160] This important question affects elementary and secondary schools as well as post-secondary institutions.

A careful reading of the majority's opinion reveals that, while it does not explicitly set forth a list of job titles that would automatically impute knowledge to the school, the holding does determine the standard by which lower courts must adjudicate future disputes. Primarily, the Court relies on the Title IX teacher-student harassment case *Gebser v. Lago Vista Independent School District*[161] to shape its entire approach, especially *Gebser*'s "actual knowledge" and "deliberate indifference" requirements. *Gebser* required notice to "an official of the recipient entity with authority to take corrective action to end the discrimination" in order for the school to have actual knowledge of the harassment.[162]

Additionally, *Davis* cites with approval the Seventh Circuit's holding to the same effect in *Doe v. University of Illinois*.[163] *Doe* held that a school district faces liability if "a school official who had actual knowledge of the abuse was invested by the school board with the duty to supervise the [harasser] and the power to take action that would end such abuse and failed to do so."[164] Furthermore, the *Davis* majority

158 *Davis*, 119 S. Ct. at 1666.

159 *See id.* at 1688–89 (Kennedy, J., dissenting).

160 *See id.* at 1688.

161 524 U.S. 274 (1998). See also Part III *supra* for a brief discussion of *Gebser*.

162 *Id.* at 290.

163 138 F.3d 653 (7th Cir. 1998), *vacated*, 119 S. Ct. 2016 (1999). See also Part II.C *supra* for an explanation of *Doe*.

164 *Id.* at 668 (internal quotation omitted).

repeatedly refers to the conduct of administrators and school boards as the source for potential liability,[165] implying that knowledge by lower-ranked employees, such as secretaries, janitors, and possibly even certain levels of teaching staff, would not impute knowledge to the school itself. Therefore, the majority implicitly and explicitly requires actual knowledge by a person employed by or representing the school or district in such a capacity as to exert substantial control over either the harasser or the situation in which the harassment occurred.[166]

Inevitably, the true impact of the standard set forth in *Davis* will flow from the lower courts' interpretation of the holding. The Tenth Circuit recently faced this question in *Murrell v. School District No. 1.*[167] *Murrell* involved a physically and mentally disabled female high school student and a fellow classmate who sexually assaulted and battered her on multiple occasions in a secluded area of the school grounds.[168] While the plaintiff's mother personally contacted the principal and various teachers regarding the incidents, the school took no action against the harasser.[169] Amazingly, the victim herself was suspended for inappropriate and detrimental behavior after a meeting between the principal and her mother, while the harasser continued to attend classes and work on campus as a janitor's assistant.[170]

The district court dismissed the claim, relying on the Fifth Circuit's holding in *Rowinsky v. Bryan Independent School District,*[171] which precluded relief without a showing of intentional discrimination by the school itself.[172] The Tenth Circuit, however, abated the case pending the United States Supreme Court's review of *Davis.*[173] Analyzing the petitioner's claim in light of *Davis,* the court in *Murrell* reversed the district court's dismissal of the Title IX cause of action and remanded the case.[174]

Unlike the *Davis* dissent's projection that lower courts would respond to the ruling with confusion and misinterpretation,[175] the court in *Murrell* tackled the issue with relative ease. While stating that *Davis*

165 *See Davis,* 119 S. Ct. at 1672–73.
166 *See id.*
167 186 F.3d 1238 (10th Cir. 1999).
168 *See id.* at 1243.
169 *See id.* at 1244.
170 *See id.*
171 80 F.3d 1006 (5th Cir. 1996).
172 *See Murrell,* 186 F.3d at 1245.
173 *See id.*
174 *See id.* at 1252.
175 *See Davis,* 119 S. Ct. at 1687–90.

"did not expressly set out the standard for determining when a school board has sufficient notice that harassment is taking place,"[176] the Tenth Circuit went on to explain that "the [*Davis*] Court held that liability properly attaches when the misconduct 'takes place while the students are involved in school activities or otherwise under the supervision of school employees.'"[177] After examining *Doe v. University of Illinois*,[178] specifically because the *Davis* Court cited it with approval, the Tenth Circuit determined that the standard required a school official who possessed substantial control of the situation.[179] Additionally, the court opined that

> [b]ecause officials' roles vary among school districts, deciding who exercises substantial control for the purposes of Title IX liability is necessarily a fact-based inquiry. *Davis* makes clear, however, that a school official who has the authority to halt known abuse, perhaps by measures such as transferring the harassing student to a different class, suspending him, curtailing his privileges, or providing additional supervision, would meet this definition.[180]

Applying this standard, the court found that the principal met this description and, therefore, the school district did have actual knowledge of the situation and would be held liable if proven to have reacted unreasonably.[181] The court also remarked that the teachers who were aware of the harassment would most likely meet the standard as well, but it declined to rule definitively on this point since knowledge had already been imputed to the school through the principal.[182]

### *D. Off-Campus Versus On-Campus Conduct*

One issue not raised specifically by the *Davis* dissent still seems to evoke concerns at the university level: the ability and duty of a school to attempt to regulate and discipline students for off-campus conduct. In regard to this issue, *Davis* states that "because the harassment must occur 'under' 'the operations of' a funding recipient [according to the mandates of Title IX,] . . . the harassment must take place in a

176 *Murrell*, 186 F.3d at 1247.

177 *Id.* (quoting Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1672–73 (1999)).

178 138 F.3d 653 (7th Cir. 1998).

179 *See Murrell*, 186 F.3d at 1247.

180 *Id.*

181 *See id.*

182 *See id.* at 1248.

context subject to the school district's control."[183] While classroom behavior and other activities occurring on school grounds during school hours would most certainly qualify, there remains the question of conduct taking place off-campus. Most likely, harassment transpiring on a school bus or while on a class field trip would be considered within the control of the school. If the harassment occurred between two students at an off-campus apartment or a movie theater, however, would the courts require the school to take some action against the harasser? This question is a bit more troublesome.

As a practical matter, the issue returns us to the question of the amount of control the school has previously attempted to exert over its students. Has the school informed students that its regulatory policies apply off-campus as well as on? Do any of the policies distinguish between on and off-campus conduct? Are administrators trained to deal with both on and off-campus situations? Who was involved in the incident and what was their relationship to the school? A court may ponder some of these questions when addressing this issue. It is safe to say, however, that the more removed the activity is from the school, the less control (and therefore liability) the school can expect and can be expected to have.

For example, consider the following situations, ranked (arguably) in order of most to least control by a university: (1) a pizza party at a local pizza parlor hosted by the university's band; (2) a school-sponsored fraternity's weekly "kegger"; (3) a group of students celebrating the latest football victory at the neighborhood bar; (4) two students' first date of dinner and a movie. It seems reasonable that the school should expect to assume some degree of responsibility for the actions of school-sponsored groups, even while off-campus. The question becomes more challenging, however, when the situation involves individual students interacting off-campus for purely personal motives. Only further interpretation by the lower courts will clarify this problem.

## V. WHAT SHOULD SCHOOLS DO TO COMPLY WITH *DAVIS*?

The Court in *Davis* cited OCR's Guidance very favorably.[184] The Guidance makes many suggestions on how schools can become Title IX compliant in regard to sexual harassment, whether peer, teacher-student, or third party. First, OCR states that

> [s]chools are required by Title IX to adopt and publish a policy against sex discrimination and grievance procedures providing for

183 Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1672 (1999) (quoting 20 U.S.C. §§ 1681(a), 1687 (1994)).

184 *See, e.g., id.* at 1675 (citing 62 Fed. Reg. 12,034 (1997)).

> prompt and equitable resolution of complaints of discrimination on the basis of sex. Accordingly, regardless of whether harassment occurred, a school violates this requirement of Title IX if it does not have those procedures and policy in place.[185]

Additionally, OCR explains that since 1975 Title IX has required that schools enact discrimination policies.[186] Therefore, all schools should certify that they have a current discrimination policy and re-examine any existing policies to determine if they meet the *Davis* standard. In order to be compliant, the policy and procedures should be easily understandable by all readers, not written in "legalese," and readily available to all students, faculty, and staff. As OCR notes,

> A grievance procedure applicable to sexual harassment complaints cannot be prompt or equitable unless students know it exists, how it works, and how to file a complaint. Thus, the procedures should be written in language appropriate to the age of the school's students, easily understood, and widely disseminated.[187]

The policy should clearly explain what types of conduct it prohibits, the precise steps for filing a complaint, and what procedures will follow a filed complaint. All investigations and hearings must be prompt, thorough, and fair to all parties. If the school determines that harassment has actually occurred, it must take appropriate disciplinary actions matching the severity of the conduct. Additionally, each school "shall designate at least one employee to coordinate its efforts to comply with and carry out its [Title IX] responsibilities."[188] The school also is responsible for providing students, faculty, and staff with the name of the coordinator, his responsibilities as they relate to sexual harassment, and how to contact him if the need arises.[189]

## VI. POST-*DAVIS* CASES

The true test of a new ruling depends on interpretation and application of the modern standard by lower courts. The Tenth Circuit's recent holding in *Murrell v. School District No. 1*[190] further explains the practical meaning of the "knowledge" standard. Additional cases shed light on other aspects of the *Davis* standard. At the

185 62 Fed. Reg. 12,034, 12,044 (1997) (internal citation omitted).

186 *See* 62 Fed. Reg. 12,051 (1997).

187 62 Fed. Reg. 12,045 (1997).

188 34 C.F.R. § 106.8(a) (1999).

189 *See* 62 Fed. Reg. 12,045 (1997).

190 186 F.3d 1238 (10th Cir. 1999). See also Part IV.C *supra* for additional discussion of this decision.

university level, in *Adusumilli v. Illinois Institute of Technology*,[191] the court deliberated over the *Davis* requirement that the harassment be "severe, pervasive and objectively offensive."[192] In *Adusumilli*, a female student alleged that four male professors and six male students had sexually harassed her.[193] Because Adusumilli had reported only two of the incidents, both involving students, to school officials, the court applied the *Davis* "actual knowledge" standard to justify only considering those two incidents in its decision.[194] While the court acknowledged that under *Davis* single incidents of student misconduct could theoretically constitute actionable sexual harassment, it ultimately decided that neither incident "involved 'pervasive' and 'offensive' harassment of the type that would be actionable under Title IX."[195] The court of appeals therefore affirmed the district court's dismissal of the case.[196]

The Sixth Circuit's decision in *Soper v. Hoben*[197] provides an interesting analysis of the "deliberate indifference" standard. In *Soper* the plaintiff, a junior high student with Down's syndrome, alleged that a classmate had raped and sexually abused her in their classroom during a lunch break, and that two other boys sexually harassed and abused her on both the school grounds and the school bus.[198] The Sixth Circuit found that, while the rape most certainly was "severe, pervasive, and objectively offensive," the plaintiff did not prove that the school acted with deliberate indifference after it had knowledge of the misconduct.[199] The court explained,

> Once [school officials] did learn of the incidents, they quickly and effectively corrected the situation. Defendants immediately contacted the proper authorities, investigated the incidents themselves, installed windows in the doors of the special education classroom, placed an aide in [the plaintiff's] classroom, and created student counseling sessions concerning how to function socially with the opposite sex.[200]

Moreover, once a criminal investigation determined that the rape had actually occurred, the school immediately expelled the boy responsi-

191 No. 98-3561, 1999 WL 528169 (7th Cir. July 21, 1999).
192 *Davis*, 119 S. Ct. at 1666.
193 *See Adusumilli*, 1999 WL 528169, at *1.
194 *See id.*
195 *Id.*
196 *See id.* at *2.
197 195 F.3d 845 (6th Cir. 1999).
198 *See id.* at 848–49.
199 *See id.* at 855.
200 *Id.*

ble.[201] The court concluded that the school board did not show deliberate indifference to the plaintiff since it acted reasonably to correct the situation as soon as officials had notice of the incidents.[202]

## CONCLUSION

It is still too premature to determine whether the *Davis* dissent's fear of a watershed of litigation will come to pass.[203] Additionally, only further litigation will determine how the issues of control, free speech, and actual knowledge by school officials will affect cases involving post-secondary institutions. We can only trust that the lower courts will apply the *Davis* standard in an effective and meaningful manner, allowing only those cases displaying true signs of actionable harassment to be heard.

The standard set forth in *Davis* does not pose a significant problem for post-secondary universities and colleges. While the holding will require many institutions to update their harassment codes and consider student complaints more seriously, this is a long-overdue change. Because courts can take into account the age of the student, the type of educational institution involved, the school's ability to control its students, and the countervailing concerns of free speech, it remains a difficult challenge to prove a university is liable under Title IX, even after *Davis*. Most important, courts examine all hostile environment sexual harassment claims under a totality-of-the-circumstances test, a test that allows schools to prove that they responded reasonably, all things considered. In sum, by setting a bright-line standard for all schools, the Court effectively ended much of the confusion and disagreement regarding sexual harassment in education. It was about time.

201 *See id.*

202 *See id.*

203 *See* Davis v. Monroe County Bd. of Educ., 119 S. Ct. 1661, 1689 (1999) (Kennedy, J., dissenting) ("The majority's limitations on peer sexual harassment suits cannot hope to contain the flood of liability the Court today begins. The elements of the Title IX claim created by the majority will be easy not only to allege but also to prove.").